(1)

90-825

No.

in the

Supreme Court of the United States

October Term, 1990

RICHARD JOSEPH LYNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BLACK & FURCI, P.A.
ROY E. BLACK, ESQ.
MARISA TINKLER MENDEZ, ESQ.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421
Attorneys for Petitioner

QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT BELOW GRANTING THE GOVERNMENT'S MOTION TO DISMISS THE PETITIONER'S APPEAL BECAUSE HE WAS A FUGITIVE AT ONE POINT DURING THE EARLY STAGES OF HIS APPEAL, DESPITE THE FACT THAT HIS ABSENCE CAUSED NO DELAY OR DISRUPTION IN THE PROCEEDINGS, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS AND HAS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, REQUIRING THIS COURT TO EXERCISE ITS SUPERVISORY POWER.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, RICHARD JOSEPH LYNN, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on August 17, 1990.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is by order filed August 17, 1990.

JURISDICTION

The order of the Court of Appeals granting the government's motion to dismiss the appeal of the Petitioner, Richard Joseph Lynn, was filed on August 17, 1990. The Petitioner's motions for reconsideration of the Circuit Court's order dismissing his appeal were filed on August 23, 1990, and September 6, 1990, and were denied on September 25, 1990. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Richard Joseph Lynn timely filed his notice of appeal, appealing his conviction and sentence of life imprisonment without parole. Mr. Lynn, who had been in pretrial custody, was transferred to his designated facility. Lynn escaped, but was back in custody by August 29, 1990. On June 13, 1990, the government filed a motion to dismiss the Petitioner's appeal. On June 25, 1990, the Petitioner filed a response to the government's motion to dismiss the appeal, requesting that the Court hold the Government's motion in abeyance for 30 days or enter a prospective order of dismissal after 30 days.

By order dated August 17, 1990, the Court of Appeals for the Eleventh Circuit granted the government's motion to dismiss the Petitioner's appeal. On August 23, 1990, the Petitioner filed a motion for reconsideration of the order of dismissal. The Petitioner filed a supplement to his motion for reconsideration on August 30, 1990, *advising the court that the Petitioner had been in custody since August 29, 1990.* Accompanying this supplemental motion for reconsideration was the Petitioner's motion for permission to file his appellate brief. At the same time, the Petitioner filed his initial brief, with the requisite copies. His brief was received by the Court of Appeals on August 27, 1990.

By order dated September 25, 1990, the Court of Appeals denied the Petitioner's motion for reconsideration and motion

to file his appellate brief. The Petitioner seeks review of the Court of Appeal's ruling dismissing his appeal.

REASON FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT BELOW GRANTING THE GOVERNMENT'S MOTION TO DISMISS THE PETITIONER'S APPEAL BEACUSE HE WAS A FUGITIVE AT ONE POINT DURING THE EARLY STAGES OF HIS APPEAL, DESPITE THE FACT THAT HIS ABSENCE CAUSED NO DELAY OR DISRUPTION IN THE PROCEEDINGS, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS AND HAS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, IT REQUIRES THIS COURT TO EXERCISE ITS SUPERVISORY POWER.

The decision of the court below dismissing the Petitioner's appeal was erroneous, since: (1) the court below did not give the Petitioner an opportunity to return himself to the court's jurisdiction within a proscribed period of time, nor did the court ever advise the Petitioner that a failure to do so would subject him to the most extreme remedy of dismissal of his appeal; (2) the Petitioner was in custody two days after the Court of Appeals received his appellate brief; and (3) his absence caused no delay in the proceedings below, and did not prejudice the government.

In *Molinaro v. New Jersey*, 396 U.S. 365 (1970), this Court held that where a defendant is a fugitive, this would prevent him from calling upon the resources of the court for determination of his claims. *Id.* at 365-6. However, in *Molinaro*, this Court only addressed a case where the litigant was a fugitive, and *not* the situation presented in this case where the Petitioner, although at one time a fugitive, was back in custody. Clearly the court's schedule was not delayed.

The appellate courts interpreting *Molinaro* have exercised

discretion before dismissing an appeal by either allowing a reasonable time for surrender, or by putting the escapee on notice that his appeal would be dismissed unless he surrenders or is recaptured within a certain period of time. *See, e.g., United States v. Snow*, 748 F.2d 928 (4th Cir. 1984); *United States v. Shelton*, 503 F.2d 797 (5th Cir. 1975), *cert. denied*, 423 U.S. 828 (1975); *United States v. Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974); *cert. denied*, 420 U.S. 962 (1975); *United States v. Swigart*, 490 F.2d 914 (10th Cir. 1973); *Brinlee v. United States*, 483 F.2d 925 (8th Cir. 1973); *United States v. Tremont*, 438 F.2d 1202 (5th Cir. 1971).

In all of these cases, the courts fashioned fair remedies in which the fugitives would be on notice by court order that their appeals would be dismissed *prospectively* unless they surrendered themselves within a proscribed period of time.

For example, in *United States v. Swigart*, the Tenth Circuit Court of Appeals entered a "tentative" order of dismissal, allowing the appellant 30 days within which to surrender himself to the custody of the United States Marshal. 490 F.2d at 915. The court's intent was to advise the fugitive that his appeal would be dismissed *at some future date* if he did not comply with the court's order. *Id.*

In *Brinlee v. United States*, the Eighth Circuit Court of Appeals similarly entered a prospective order of dismissal of the appellant's appeal, putting the appellant on notice that, unless he submitted himself to the jurisdiction of the court or was taken into custody by State or federal officers within 30 days of the court's order, his appeal would be dismissed. 483 F.2d at 927. The Eighth Circuit specifically relied upon this Court's decision in *Molinaro v. New Jersey*, 396 U.S. 365 (1970). *See also, United States v. Sperling*, 506 F.2d at 1345 n.33 (court similarly entered prospective order of dismissal allowing fugitive to return himself to custody or be returned to custody within 30 days of the order).

A somewhat different situation was presented in *United States v. Snow*, 748 F.2d 928 (4th Cir. 1984). There, the court held that it would exercise its discretion to consider the defendant's appeal, *despite* the fact that he had escaped while his appeal was pending, and was recaptured only against his will, since he was back in custody within less than 30 days from his escape and *before his appeal was to be heard*, and further, because he did not have an opportunity to comply with a court order requiring him to surrender and reinstate his claim. *Id.* at 930. The Fourth Circuit recognized that it would be *inequitable to punish Snow for his escape after he had been recaptured by dismissing his appeal*, since he would be subject to a separate punishment for the escape, and further, because his escape and subsequent recapture *did not inconvenience the court's schedule*, and oral argument was able to proceed as planned. *Id.* at 929-30.

The Fourth Circuit followed what is the common practice amongst the Circuit Courts of Appeals by putting the fugitive on notice that the *extreme* remedy of dismissal of his appeal will be invoked only if he fails to return or is not recaptured within a proscribed period of time. Further, the Fourth Circuit recognized that its case was different from those cases where an individual is still in escapee status at the time when their cases are scheduled for oral argument, or there has been some inconvenience to the court's schedule, since Snow was back in custody, and the court had not been inconvenienced. Although the court would not condone the escapee's flight from justice, since his actions constituted an independent crime, the court recognized that it would be unreasonable to punish him *twice* by dismissing his appeal. 748 F.2d at 930 n.3.

The situation existing in *Snow* is the same as in the present case. The remedy fashioned by the court in *Snow* should have been the type of remedy fashioned in this case.

Here, Richard Lynn was back in custody well before the Court of Appeals would have reviewed the merits of his appeal. Lynn has been indicted for the crime of escape, and

by dismissing Lynn's appeal, the court below has punished him twice — a practice which is not adopted by other Circuit Courts addressing a similar situation. *See United States v. Snow*, 748 F.2d 928 at 930 n.3. Second, Lynn's escape and subsequent recapture did not inconvenience the court's schedule. The Petitioner was back in custody two days after his appellate brief was received by the court. One co-appellant's brief was docketed in the court on August 27, 1990 — the same day the Petitioner's brief was received. His other co-appellant has *yet to file his appellate brief*, which is due to be filed on or before November 16, 1990. Clearly, there was no delay in the court's schedule because of the Petitioner's escape. The appellate process continued in an orderly manner, as indicated by the court's various rulings.

The opinion of the court below dismissing the Petitioner's appeal clearly conflicts with the decisions of other Circuit Courts addressing the situation where an individual is a fugitive. Here, there has been no showing that the Petitioner flagrantly refused to obey any order of the Court of Appeals to return to the court's jurisdiction with the knowledge that his disobedience would cost him his right to appeal, since the court below *never put the Petitioner on notice of its intention to dismiss his appeal.* The drastic and serious measures taken by the court below has created an obvious conflict between this Court and other Circuit Courts of Appeals.

Although Richard Lynn was a fugitive at one point during the pendency of his appeal, he was in custody *prior* to his case being submitted to the court for decision and had no notice that his absenting himself from the court's jurisdiction would cost him his appeal.

The Petitioner raised five issues of error in the trial court supporting his request for reversal of conviction and a new trial. The jury selection process used at the trial was not random and, therefore, in clear violation of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861. The trial court only allowed selection of jurors from lists with surnames beginning

with the letters "A" to "H," and the alternate jurors were selected from potential jurors having surnames beginning with the letters "H" to "J." This procedure clearly introduced a "significant element of non-randomization" into the jury selection process. *See, e.g., United States v. Kennedy,* 548 F.2d 608 at 612 (5th Cir. 1977). *See also, Kraus v. Chartier,* 406 F.2d 898 (1st Cir. 1968).

The trial court erroneously quashed a defense subpoena issued to a government witness. The evidence sought by the subpoena was admissible pursuant to Rule 401, Federal Rules of Criminal Procedure, and under the Sixth Amendment's Compulsory Process Clause, the Petitioner had a right to subpoena it. *See, United States v. Silverman,* 745 F.2d 1386 at 1397 (11th Cir. 1984).

The trial court allowed the government to introduce into evidence reports made by private investigators working on behalf of the Petitioner — reports which were protected by the attorney/client privilege as confidential work product. The memoranda were prepared and analyzed by the Petitioner's agent in connection with his defense. Production of these documents and submission to the jury was extremely prejudicial. *See United States v. Nobles,* 422 U.S. 225 at 238 (1975); *Von Bulow by Anersperg v. Von Bulow,* 811 F.2d 136 (2d Cir. 1987), *Charles Woods Television Corporation v. Capital Cities/ABC, Incorporated,* 869 F.2d 1155 at 1161 (8th Cir. 1989); *In re Murphy,* 560 F.2d 326 at 337-9 (8th Cir. 1977).

Perhaps the most serious error committed by the trial court was during sentencing when it enhanced the Petitioner's sentence to life imprisonment without parole, despite the fact that the Petitioner was acquitted by the jury of the continuing criminal enterprise charge in which he was charged as the principal manager, supervisor and leader of the enterprise. This sentence was imposed in violation of law and through an incorrect application of the sentencing guidelines. The Petitioner's status as manager of the continuing criminal enterprise was a question of fact for the jury to decide, which

they did decide, by acquitting the Petitioner of this count. *See United States u Oberski*, 734 F.2d 1030 at 1032 (5th Cir. 1984).

The Petitioner was erroneousiy sentenced to a term of life imprisonment without the possibility of parole.

To summarily dismiss Richard Lynn's appeal, considering the severity of his sentence, is unconscionable. Particularly in this case, where the Petitioner was back in custody two days after the court below received his brief, which *never* disrupted the court's schedule or caused any prejudice to the government, he should have his appeal reinstated and adjudicated on its merits.

CONCLUSION

For the reasons stated, the Petitioner prays this Court issue a writ of certiorari.

Respectfully submitted,

BLACK & FURCI, P.A.
ROY E. BLACK, ESQ.
MARISA T. MENDEZ, ESQ.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida, 33131
(305) 371-6421

By_____
ROY E. BLACK, ESQ.
Attorney for Petitioner

MTM/wg
3777

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7925

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD JOSEPH LYNN,
ROBERT IRVING EYSTER, a/k/a DICKIE,
JACK LEROY MARSHALL,
Defendants-Appellants.

Appeal from the United States District
Court for the Southern District of Alabama

BEFORE: ANDERSON, COX and BIRCH,
Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss the appeal of RICHARD J. LYNN is granted.

(2)

NO. 90-825

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

RICHARD JOSEPH LYNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BLACK & FURCI, P.A.
ROY E. BLACK, ESQ.
MARISA T. MENDEZ, ESQ.
201 S. Biscayne Blvd.
Suite 1300
Miami, Florida 33131
(305)371-6421
Attorneys for Petitioner

QUESTION PRESENTED

I.

WHETHER THE DECISION OF THE COURT BELOW GRANTING THE GOVERNMENT'S MOTION TO DISMISS THE PETITIONER'S APPEAL BECAUSE HE WAS A FUGITIVE AT ONE POINT DURING THE EARLY STAGES OF HIS APPEAL, DESPITE THE FACT THAT HIS ABSENCE CAUSED NO DELAY IN THE PROCEEDINGS, HE WAS IN CUSTODY TWO DAYS AFTER HIS APPELLATE BRIEF WAS RECEIVED BY THE COURT, AND HIS ABSENCE CAUSED NO PREJUDICE TO THE GOVERNMENT IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS AND HAS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, REQUIRING THIS COURT TO EXERCISE ITS SUPERVISORY POWER.

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OCTOBER TERM, 1990

RICHARD JOSEPH LYNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, RICHARD JOSEPH LYNN, by his undersigned counsel, and pursuant to Supreme Court Rules 15.7 and 18.9, hereby submits this supplemental brief in support of

his petition for writ of certiorari, filed with this Honorable Court on November 15, 1990.

Undersigned counsel wishes to call to this Court's attention the case of Katz v. United States, 920 F.2d 610 (9th Cir. 1990). Katz, which was decided subsequent to the Petitioner's filing of his petition for writ of certiorari, directly supports the Petitioner's argument that an individual who was once a fugitive during the pendency of his appeal but is recaptured or voluntarily surrenders, does not lose his right to have the merits of his appeal adjudicated. The Ninth Circuit Court of Appeals in Katz did recognize the continuing validity of this Court's holding in Molinaro v. New Jersey, 396 U.S. 365 (1970), that when a defendant is a fugitive he would be prevented from calling upon the resources of the appellate court for determination of his claim. However, the Katz

court agreed that when the circumstances have changed and the defendant is no longer a fugitive, he is entitled to have his appeal adjudicated.

CONCLUSION

For the reasons stated in the Petitioner's petition for writ of certiorari and this supplemental brief, the Petitioner prays this Court issue a writ of certiorari.

Respectfully submitted,

BLACK & FURCI, P.A.
ROY E. BLACK, ESQ.
MARISA T. MENDEZ, ESQ.
201 S. Biscayne Blvd.
Suite 1300
Miami, Florida 33131
(305)371-6421

By _____
ROY E. BLACK, ESQ.
For the Petitioner

MTM/wg

3777

No. 90-825

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD JOSEPH LYNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal because he was a fugitive.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990. A petition for rehearing was denied on September 25, 1990. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was con-

victed on one count of conspiring to import cocaine, in violation of 21 U.S.C. 963; on three counts of importing cocaine, in violation of 21 U.S.C. 952; on one count of conspiring to distribute cocaine and marijuana, in violation of 21 U.S.C. 846; and on two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to life imprisonment. The court of appeals dismissed petitioner's appeal. Pet. App. 1.

The evidence at trial showed that from 1982 to 1989 petitioner was a participant in a major cocaine and marijuana trafficking organization. The organization purchased large quantities of the drugs in Colombia, caused the drugs to be delivered by boat and by plane to various locations in Alabama and other southeastern States, and distributed the drugs in Florida and in other States.

Petitioner was sentenced to life imprisonment and began serving his sentence on December 15, 1989. On March 27, 1990, while his appeal was pending, petitioner escaped from the Federal Correctional Institution at Talladega, Alabama. The government subsequently filed a motion to dismiss petitioner's appeal because he was a fugitive. On June 25, petitioner's counsel filed a response, asking the court to hold the government's motion to dismiss the appeal for 30 days or to enter an order prospectively dismissing the appeal after 30 days, so that petitioner could be given an opportunity to surrender. On August 17, the court of appeals dismissed petitioner's appeal. Pet. App. 1.

On August 23, petitioner's counsel filed a motion for reconsideration on the ground that counsel had diligently prepared an appellate brief that raised several viable issues. Petitioner was recaptured by the authorities on August 29. The next day, petitioner's counsel filed a supplement to the motion for reconsideration notifying the court of appeals of petitioner's recapture. The court of appeals denied peti-

tioner's motion for reconsideration of its order dismissing petitioner's appeal.

ARGUMENT

The court of appeals correctly dismissed petitioner's appeal and its action does not conflict with the decisions of any other court of appeals. Further review of petitioner's claim is therefore unwarranted.

A reviewing court is authorized to dismiss the appeal of a defendant who has become a fugitive. In *Molinaro* v. *United States*, 396 U.S. 365 (1970), the Court dismissed the appeal of a defendant who had become a fugitive while his case was on appeal, stating that the defendant's escape "disentitles [him] to call upon the resources of the Court for determination of his claims." 396 U.S. at 366. See *United States* v. *Sharpe*, 470 U.S. 675, 681-682 & n.2 (1985); *United States* v. *Wright*, 902 F.2d 241, 242-244 (3d Cir. 1990); *United States* v. *Alvarez*, 868 F.2d 547, 548 (2d Cir. 1989).

A fugitive is not entitled to have his appeal reinstated if he is captured. See, *e.g.*, *United States* v. *DeValle*, 894 F.2d 133, 135-136 (5th Cir. 1990); *United States* v. *Persico*, 853 F.2d 134, 136-138 (2d Cir. 1988); *United States* v. *Puzzanghera*, 820 F.2d 25, 25-27 (1st Cir.), cert. denied, 484 U.S. 900 (1987). As stated in *Puzzanghera*, a recaptured fugitive "has few if any equities to argue." 820 F.2d at 27. In *Estelle* v. *Dorrough*, 420 U.S. 534 (1975), this Court rejected an equal protection challenge to a state statute that required the dismissal of a fugitive's appeal if he did not voluntarily surrender within ten days of his escape. The Court stated that the statute discourages escapes, encourages voluntary surrenders, and promotes the "efficient, dignified operation" of the state reviewing court. *Id.* at 537.

Petitioner complains (Pet. 4-5) that the court of appeals did not follow the procedure of those courts of appeals that

have issued a prospective or conditional notice of dismissal if the fugitive is not returned to custody within a specified period of time—usually 30 days. See, *e.g.*, *United States* v. *Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States* v. *Swigart*, 490 F.2d 914, 915 (10th Cir. 1973); *Brinlee* v. *United States*, 483 F.2d 925, 927 (8th Cir. 1973), cert. denied, 419 U.S. 878 (1974). As an initial matter, there is no requirement that a court of appeals issue such an order. See *United States* v. *Wright*, 902 F.2d at 243.[1]

In any event, the court of appeals did not err by failing to issue such an order in this case. In his June 25 response to the government's motion to dismiss, petitioner's counsel asked the court of appeals *either* to hold the government's motion to dismiss in abeyance for 30 days *or* to enter an order prospectively dismissing the case after 30 days. The court of appeals effectively granted petitioner's first suggestion by not dismissing petitioner's appeal until August 17, which was well beyond the 30-day period petitioner requested and almost five months after petitioner had escaped. Accordingly, petitioner cannot reasonably complain about the court's actions.[2]

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[1] Petitioner's reliance (Pet. 5) on *United States* v. *Snow*, 748 F.2d 928 (4th Cir. 1984), is misplaced. In *Snow*, the Fourth Circuit exercised its discretion to hear the appeal of a recaptured fugitive because he had been returned to custody within 30 days of his escape. In this case, in contrast, petitioner was not recaptured until approximately 150 days after his escape.

[2] In his supplemental brief, petitioner calls the Court's attention to *Katz* v. *United States*, No. 89-35797 (9th Cir. Dec. 11, 1990). In that case, the court of appeals agreed to hear the defendant's appeal of the denial of the motion he filed under 28 U.S.C. 2255 alleging ineffective assistance of counsel, even though the defendant had previously been a fugitive, because the defendant had been recaptured at the time that he filed the Section 2255 motion. However, the ineffective assistance

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
THOMAS E. BOOTH
Attorney

FEBRUARY 1991

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of counsel claim was based on his lawyer's failure to perfect an appeal, and the court rejected the ineffectiveness claim because "we would have dismissed Katz's direct appeal, if perfected, on the basis of *Molinaro* because he was then a fugitive when that appeal was pending." Slip op. 15056.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20373